MAY
JAMES R. B

Supreme Court of the United States

October Term, 1961

NO. [redacted]

BAUER-SMITH DREDGING CO., INC., *Petitioner*

versus

UNITED STATES OF AMERICA, *Defendant*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES	5
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	16
APPENDIX A	17
APPENDIX B	21
APPENDIX C	41

LIST OF AUTHORITIES

CASES

Admiral Oriental Lines v. United States, 86 F.2d 201	3, 12, 14
Bauer-Smith Dredging Co. v. Tully, et al., 305 S.W.2d 805	9
Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 367, 367 (5 CA), cert. den. 341 U.S. 934	10
I. H. Smith Co. v. Wartfemus, 201 Md. 367, 93 Atl.2d 764, 766	13
Jemison v. The Dredge Duplex, 163 F.Supp. 947 (D.C. Ala.)	5, 14
Ozark Dam Constructors v. United States, 130 Ct.Cl. 354, 359, 127 F.Supp. 187, 190	5, 14
Plumley v. United States, 226 U.S. 544	11
Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124	3, 13
Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627	10
United States v. Atlantic Dredging Co., 35 Ct.Cl. 354, 359, aff. 253 U.S. 1, 10, 11, 12	14
United States v. McShain, 308 U.S. 515	11
United States v. Moorman, 338 U.S. 457	2, 3, 11
Whitaker v. Colman, 115 F.2d 305, 307 (5 CA)	10
Yearsley v. W. A. Ross Construction Co., 309 U.S. 18	3, 4, 12

UNITED STATES STATUTES

Act of March 3, 1925, House Doc. 238—68th Congr., 1st Sess.; 43 Stat. at Large 1186	7
Civil Functions Appropriation Act, 1952, Public Law 203, 82d Congr., 1st Sess., Chap. 556 (H.R. 4386), Vol. 1 of 1951, Sess., p. 632, United States Congr. and Adminis. Service	7
28 U.S.C. 1255(1)	2
33 U.S.C. 1	5
33 U.S.C. 408	5
33 U.S.C. 540	6
33 U.S.C. 621	6
33 U.S.C. 622	7
41 U.S.C. 54.13(10)	4, 5, 7

TEXTS

19 A.L.R. 226, 253	13
2 Am. Jur. 13, 14, 16, 17	13
Restatement of the Law of Agency (2nd Ed.), Secs. 82, 101	3
Restatement of the Law of Agency (2nd Ed.), Secs. 432, 438, 439(c)(d)(e)	3, 13

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BAUER-SMITH DREDGING CO., INC., *Petitioner*
versus
UNITED STATES OF AMERICA, *Defendant*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review a ruling of the United States Court of Claims, wherein a Motion for Summary Judgment filed by the United States was granted and a Motion for Summary Judgment filed by Petitioner was denied in an indemnity action involving the breach of a Federal dredging contract by United States.

OPINION BELOW

The opinion of the United States Court of Claims in support of its ruling on Motions for Summary Judgment is unreported but is printed in Appendix A hereto attached, infra, p. 17.

JURISDICTION

The ruling on Motions for Summary Judgment was made on December 1, 1960, and an order denying a Motion for Rehearing was entered on March 1, 1961. The jurisdiction of this Court is invoked under 28 USC 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims may, on a Motion for Summary Judgment, dismiss the pleading of a Federal dredging contractor when fact issues are raised as to the proper performance of a Federal contract and where it is uncontested that the Government plans and specifications are inaccurate and erroneous and that various contractual warranties have been breached by the Government, as outlined in the attached pleading, Appendix B, p. 21.[1]

2. Whether the Court of Claims may disregard the principles of law stated in *United States v. Moorman,* 338 U.S. 457, and deny a Government contractor the right to indemnity on the ground that the dredging services were not performed in accordance with the Federal plans and specifications, when it is undisputed that the Secretary of Army, through his official representatives, certified that a Federal contract was properly performed according to Government plans and specifications.[2]

3. Does the United States adopt and ratify the acts of its contractor where the Federal Government, with full knowl-

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[1] See Court of Claims Rule 51(d), which provides that if there are issues as to any material fact, a summary judgment cannot be granted.

[2] According to the argument of the Justice Department in the **Moorman Case,** the decision of a Federal Contracting Officer is binding on all courts. See Annotation in 91 L.Ed. 761. See Record pp. 6 and 12.

edge of alleged third party property damage claims, certifies that the Federal contractor performed his work in accordance with Government plans and specifications and to the complete satisfaction of the United States?[3]

4. Is the United States estopped to deny that its contractor failed to properly perform a Government dredging contract according to plans and specifications, after the Government's Contracting Officer approved and certified that the dredging work was performed in accordance with the Government's plans and specifications and further where the United States as a party to the contract does not contest this fact or question the good faith of its Contracting Officer?[4]

5. Is a Federal contractor entitled to receive indemnity, as a matter of law, where the United States fails to controvert the pleaded issue that third party property damage occurred as a normal and necessary incident to the prosecution of a Federal dredging contract, the proper performance of which was certified to by the Government's Contracting Officer?[5]

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[3] This question is answered in the affirmative by **Yearsley v. W. A. Ross Construction Co.**, 309 U.S. 18, and **Restatement of the Law of Agency** (Second Edition), Sections 82, 101.

[4] The rational of **United States v. Moorman**, 338 U.S. 457, and related cases of the Court of Claims, require an affirmative answer to this question. The Court of Claims' negative answer finds no support in law.

[5] The Court of Claims, in its decision, states that Petitioner does not claim that third party property damages occurred as a necessary incident to placing spoil in designated areas. This is clearly in error. See Appendix, pp. 22-23, 43. According to the legal principles stated in **Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.**, 350 U.S. 124, and **Admiral Oriental Lines v. United States**, 86 F.2d 201, the Petitioner is entitled to indemnity. Also see **Restatement of the Law of Agency**, Sections 132, 438, 439(c)(d)(e).

6. Whether the Court of Claims may, in a contract action, adopt as "final" the fact findings in a State Court negligence action against a Federal contractor when it is undisputed that the United States, with ample and timely notice of the tort suit, refused to be a party to the tort action" and could not be impleaded by reason of its sovereign immunity and where the Federal Contracting Officer's findings conflict with the State court's findings.[6]

7. Whether the Court of Claims may, without any fact evidence before it, rule that a dredging contractor is not an "agent" of the United States, when such a ruling is contrary to the River and Harbor Act, wherein the Secretary of the Army is granted the non-delegable duty of controlling and prosecuting dredging work conducted in the navigable waters of the United States, and where Congress has not granted any of these non-delegable duties to private dredging contractors and where this Court has declared in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 22, that a private contractor performing dredging work for the United States is an "agent" of the United States.

8. Whether Federal agencies of the Executive Branch of the Government are immune from contractual liability and may avoid the legal consequences of their own contractual errors and mistakes and breach of warranties by relying on a Federal standard contract clause, 41 USC 54.13(10), referred to as the "Responsibility Clause", and which reads as follows:[7]

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[6] The doctrine of res adjudicata and equitable estoppel adopted by the Court of Claims is inapplicable because the tort action in the State Court and the Court of Claims contract action are different and the parties to these lawsuits are different.

[7] As far as can be determined, the Supreme Court has not ruled on this question. According to the decision in **Jemison v. The**

"The contractor shall, without additional expense to the Government, . . . be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work performed and shall be responsible for all materials delivered and performed until completion and final acceptance, except for any completed unit thereof which may theretofore have been finally excepted."

STATUTES

Title 33 USC 1, *Regulations by Secretary of Army for Navigation of Waters, Generally*

"It shall be the duty of the Secretary of Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property or of operations of United States in channel improvements, covering all matters not specifically delegated by law to some other executive department. . . ." August 18, 1894, c. 299, Sec. 4, 28 Stat. 362; June 3, 1902, c. 1079, Secs. 6, 11, 32 Stat. 374; August 8, 1917, c. 49, Sec. 7, 40 Stat. 266.

Title 33 USC 408, *Taking Possession of, Use of, or Injury to Harbor or River Improvements*

"It shall not be lawful for any person or persons to take possession of or make use of for any purpose,

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Dredge Duplex, 163 F.Supp. 917 (D.C. Ala.), a negative answer is required. There is no legal support for the Court of Claims ruling. As between United States and Petitioner the issue of fault or negligence has never been resolved. **Ozark Dam Constructors v. United States**, 130 Ct. Cl. 253, 259, 127 F.Supp. 187, 190.

or build upon, alter, . . . or in any manner whatsoever impair the usefulness of any . . . levee . . . or other work built by the United States, . . .; Provided, that the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for temporary occupation or use of any of the aforesaid mentioned public works when in his judgment such occupation or use will not be injurious to the public interest." March 3, 1889, c. 425, Sec. 14, 30 Stat. 1152.[8]

Title 33, USC 540, *Improvements; Control by Department of the Army.*

"Federal investigations and improvements of rivers, harbors and other waterways shall be under the jurisdiction of and *shall be prosecuted by the Department of the Army under the direction of the Secretary of the Army and the supervision of the Chief of Engineers,* except as otherwise specifically provided by Act of Congress, which said investigations and improvements shall include a due regard for wildlife conservation." June 20, 1938, c. 535, Sec. 1, 52 Stat. 802. (Emphasis supplied)

Title 33 USC 621, *By What Methods River and Harbor Work May Be Authorized To Be Prosecuted*

"Any public work on canals, rivers, and harbors, adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing contracts." Sept. 22, 1922, c. 427, Sec. 10, 42 Stat. 1043.

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[8] No permission was granted the third party claimant to construct a canal and a fresh water reservoir next to the levee in the spoil area in question.

Title 33 USC 622, *Method of Doing Work, Generally*

> "It shall be the duty of the Secretary of the Army to apply the money appropriated for improvements of rivers and harbors, . . . In all cases where the project for a work of river or harbor improvement provides for the construction or use of Government dredging plant, the Secretary of Army may, in his discretion have the work done by contract if reasonable prices can be obtained." August 11, 1888, c. 860, Sec. 3, 25 Stat. 423; July 25, 1912, c. 253, Sec. 1, 37 Stat. 222; Mar. 2, 1919, c. 95, sec. 3, 40 Stat. 1287.

Title 41, Section 54.13(10). See 41 USCA, Appendix, Page 305, *Rules and Regulations Implementing Public Contracts*. Article 10, *Permits and Responsibility for Work*.

> "The contractor shall, without additional expense to the Government, . . . be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged."

Act of March 3, 1925, House Document 238 - 68th Congress, 1st Session; 43 Stat. at Large 1186, authorizing construction of the dredging of the Intracoastal Canal contingent upon the United States obtaining easements to deposit material in the section in question.

Civil Functions Appropriation Act, 1952, Public Law 203, 82nd Congress, First Session, Chapter 556 (H.R. 4386), Vol. 1 of 1951 Sess., Page 632 of United States Congressional and Administrative Service. Appropriation of $192,657,613.00 for maintenance and preservation of rivers and harbors.

STATEMENT OF THE CASE

A petition for indemnity was filed by the dredging contractor, Petitioner herein, in the Court of Claims on June 5, 1959. Jurisdiction of that Court was invoked under Act of Congress of June 25, 1948, 28 USC 1491(4).

Petitioner executed a standard printed dredging contract with the United States on March 17, 1952, wherein it agreed to dredge a section of the Intracoastal Waterway near Port Arthur, Texas. The United States agreed to provide a spoil disposal area adjacent to the waterway and Petitioner agreed to deposit dredged material in the areas designated on dredging charts furnished by the Chief of Engineers, Corps of Engineers, U. S. Army. The dredging contract also provided that all disputes concerning questions of fact shall be decided by the Contracting Officer and that the Contracting Officer, upon satisfactory completion of the dredging work, shall so certify. It was mutually agreed, in writing, that Federal administrative decisions relating to the performance of the dredging contract would be final and conclusive.

As between the United States and Petitioner, it is uncontested, and admitted by the Corps of Engineers, U. S. Army, that Petitioner's Dredge J. J. MANSFIELD deposited dredged material in disposal areas designated by the United States in the manner required by the dredging contract in the area under consideration. See copy of uncontroverted petition, Appendix B, hereto attached, pp. 25, 26, 48, 51. Moreover, the United States Contracting Officer, together with third party damage claimant and the dredging contractor inspected the area in question shortly after the dredged material was deposited upon the land in question. The legal representative of the Secretary of Army, at the scene of the dredging operations, found that

the dredged material was properly deposited in areas designated by the United States and that all terms of the dredging contract were performed in accordance with the plans and specifications of the United States. No exceptions were taken by the Government as to the manner in which the dredging work was performed and the Petitioner was paid in full for its services.

After the dredging work was completed, a servient riparian landowner, who granted an easement to the United States to deposit spoil upon the land in question, filed a trespass and negligence action against Petitioner in the State Court of Texas. There being no diversity of citizenship, it was impossible to remove the case to the Federal Court where the United States could have been impleaded. A State Court judgment in a tort action was entered against the Petitioner. *Bauer-Smith Dredging Co. v. Tully et al.*, 305 S.W. 2d 805. Upon payment of said judgment, Petitioner filed a contract claim for indemnity and restitution against the United States to recover the judgment paid and for the cost of defending a third party tort claim.

Prior to the time the servient riparian landowner filed its tort action against Petitioner, an attempt was made to have the United States join in settlement negotiations. This the Government declined to do on the grounds that the United States had a dredging easement entitling the United States to deposit spoil upon the land alleged to be damaged. When the landowner filed a third party lawsuit for damages against the dredging contractor, the United States again declined to have anything to do with tort claims against its contractor. Since the Federal Government could not be impleaded in the State Court action, the United States was able to insulate itself from third party tort liability.

For a statement of detailed facts, see Petitioner's uncontroverted pleading filed in the Court of Claims, Appendix B hereto attached, pp. 21-43.

REASONS FOR GRANTING THE WRIT

1. It is a cardinal principle of law that every citizen of the United States is entitled to have his day in Court against his adversary, and have fact issues resolved before a Court with the right of cross examining adverse witnesses. The Court of Claims short circuited this inalienable right by granting the Government's Motion for Summary Judgment in a case where there are genuine issues of fact. The Court's ruling is directly in conflict with the principles of law stated in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, and *Whitaker v. Colman*, 115 F. 2d 305, 306, 307 (5 CA)[9], and *Gray Tool Co. v. Humble Refining Company*, 186 F. 2d 365, 367 (5 CA), cert. den. 341 U.S. 934, where Judge Hutcheson observed that the lower court, as frequently happens, misused a trial shortcut; that cutting trials short is not an end in itself but a means to an end; that the longest way around in some cases is the shortest way through. It is often said that crowded dockets encourage the disposition of cases by summary judgment at the sacrifice of truth and justice demanded.

In the case at bar, even the Justice Department admits there are fact issues to be determined by the Court of Claims (R. 76, 77), but with tongue in cheek, the Government suggests that the fact issues only apply to petitioner's cross motion and not to the Government's motion.

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[9] "Summary judgment procedure is not a catch penny contrivance to catch the unwary litigants into its toils and deprive them of a trial. it is a liberal measure, liberally construed to arriving at the truth."

There is no legal authority to support this vague and nebulous distinction. It is in conflict with Court of Claims Rule 51(d).

2. The Court of Claims decision is in direct conflict with the established principles of law consistently adhered to by the Supreme Court from *Plumley v. United States*, 226 U.S. 544, to *United States v. Moorman*, 338 U.S. 457, to-wit: the decision of a Federal Contracting Officer regarding facts relating to the performance of a Federal contract is conclusive and final. In the case at bar, the Court of Claims subordinated a Federal Contracting Officer's fact findings to the fact findings of a State Court in a third party tort action in which the United States was not a party. Contrary to admonishment in *United States v. McShain*, 308 U.S. 515, the Court of Claims borrowed fact findings from the State Court decision to controvert the facts found by the Contracting Officer and then erroneously ruled "we treat the decision of the Court of Civil Appeals as final". (R. 132). This ruling was made in spite of the fact that the fact findings in the third party tort lawsuit were not res adjudicata to the instant contract case for indemnity because the parties were different. It is significant that in *United States v. Moorman*, the Solicitor General then argued for the proposition that in the absence of fraud or bad faith, the decision of a Federal Contracting Officer is conclusive and cannot be set aside by a Court. In the present case, the Justice Department reversed its course and the Court of Claims went along with the Government's present argument which finds no support in law.[10]

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[10] See 91 L.Ed. 261, for an extended annotation entitled "Validity and Construction of Provisions in Federal Contracts Which Made Administrative Decisions upon Contractual Disputes Final and Conclusive."

3. The Court of Claims decision is in direct conflict with the principles of law stated in the dredging case of *Yearsley v. W. A. Ross Construction Co.*, 338 U.S. 18, where the Supreme Court ruled that a Federal dredging contractor was an agent of the United States and also ruled that where a dredging contractor executes the will of Congress, there can be no liability on the part of the contractor. Also see *Admiral Oriental Lines v. United States*, 86 F. 2d 201, 202 (2 CA). The latter case holds that United States adopts and ratifies the acts of its contractors who perform a dredging contract in accordance with Federal plans and specifications. The Court of Claims avoided the impact of the above decisions by stating that the mere acceptance of a dredging contractor's work does not mean that the United States assumes the responsibility of a contractor's negligent acts. This ruling of the Court of Claims cannot be applied to the situation at bar where the contractor's negligent acts are caused by or result from the Government's failure to furnish proper plans and specifications, and occur as a necessary incident to the deposit of spoil in areas designated by the Government, a fact issue decided by the Contracting Officer in favor of Petitioner.

It comes as quite a shock to the dredging industry that the Court of Claims now concludes that a Federal dredging contractor is at liberty to perform dredging contracts in any manner it sees fit and that the Government is not interested in the method in which dredging work is performed, only in results. (R. 130). Such conclusions are unfounded in fact and in law. They are in conflict with the *Yearsley Case* and the Acts of Congress heretofore quoted. Congress granted the Secretary of Army the nondelegable duty of prosecuting dredging work in the navi-

gable waters of the United States. (33 USC 540). The Legislative branch of the Government did not intend to give control over Federal dredging projects to private contractors. (33 USC 622).

On the slim authority of the comment (i) of Section 438 of the *Restatement of the Law of Agency*, the Court of Claims declared Federal dredging contractors to be independent contractors. Sections 1 and 2 or 1, 2 and 220 of the *Restatement of the Law of Agency*, indicates that the Court of Claims is in error. Also see 2 *Am. Jur.* 13, 14, 16, 17, and 19 ALR 226, 253; and *I. H. Smith Co. v. Warffemus*, 201 Md. 367, 93 Atl. 2d 764, 766. If a Federal dredging contractor should ever presume to act in the capacity of an independent contractor for the United States, then the Secretary of Army would be the first to challenge his acts. The novel decision of the Court of Claims concerning the legal relationship of the parties to a Federal dredging contract displaces accepted and customary Federal dredging practices and creates unwarranted confusion as to the legal status of a Federal contractor engaged in river, canal and harbor improvement projects, and the respective contractual responsibilities and obligations of the Secretary of Army, Chief of Engineers, U. S. Army, Contracting Officers, Contractors and United States citizens.

4. The Court of Claims decision is contrary to the legal principles of indemnity discussed and applied in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124, 132-135, and subsequent related cases[11] extending the right of indemnity to shipowners in longshoremen cases, and the

[11] **Weyerhauser SS Co. v. Nacirema,** 355 U.S. 563; **Crumady v. The Joachim Hendrik Fisser,** 358 U.S. 423

principle of law stated in *Admiral Oriental Lines v. United States* (2 CA), 86 F. 2d 201, 202.

5. The importance of the case at bar should be self-evident because it directly effects business dealings of the United States with private citizens and poses a serious and unwarranted invasion by the Government upon basic concepts of contractual responsibility. Congress and this Court have repeatedly declared that the Government is not entitled to preferred treatment in its business relationship with its citizens. In the case at bar, the Government asked for and received immunity from its own contractual errors and mistakes. The Government was permitted to accept dredging work as being properly performed and then subsequently, in an indemnity action, was permitted to disavow its acceptance of dredging service performed according to the Government's plans and specifications contrary to the ruling in *United States v. Atlantic Dredging Co.*, 35 Ct. Cl. 354, 359, affd. 253 U.S. 1, 10, 11, 12. In order to protect the small businessman and encourage him to bid on Government work projects, the Executive Department of the Government prescribed standard contract clauses such as the "Responsibility Clause". (41 USC 54.13, Article 10). The Court of Claims, in the case at bar, reads into this clause the additional provision that the United States is rendered immune from its own contractual errors if their contractor is found guilty of negligence while performing dredging work in accordance with Government plans and specifications. This is contrary to the ruling in *United States v. Atlantic Dredging Co.*, 253 U.S. 1, 10, 11; *Jemison v. The Dredge Duplex*, 163 F. Supp. 947, 951, and *Ozark Dam Constructors v. United States*, 130 Ct. Cl. 354, 127 F. Supp. 187. As far as can be determined, the

Supreme Court has never been called upon to rule on the scope of the "Responsibility Clause". The recent Supreme Court decisions relating to indemnity makes an interpretation of this clause increasingly important and necessary because dredging contractors need to know how much risk they are assuming when they work for the United States.

Congress appropriates millions of dollars each year for the maintenance of the navigable waters of the United States. A large percentage of this tax money is spent for Federal dredging services rendered by various dredging contractors throughout the United States. These businessmen, according to the lower court's decision, now find themselves in the position of being insurers for the Government's contractual errors and at the same time find that the United States is immune from their breach of warranties. The Federal dredging contract requires a Federal contractor to satisfy the provisions of a dredging contract in order to be paid for his service. If the dredging contractor does this, then according to the Court of Claims decision, he must accept the risk of third party liability without any recourse against the United States for indemnity or restitution. Such business procedure based upon a "heads I win, tails you lose" concept of contractual responsibility would not endure in private business and should not be permitted to exist in business transactions between the United States and its citizens. In view of the tremendous sums of tax money involved in Government business transactions with private contractors, a decision from this Court would clarify the confusion and inequity resulting from an unjust decision wherein a Government contractor is summarily cut off from contractual relief against the

United States in a case where the parties to the Government contract agreed that work done was in accordance with Government plans and specifications. (R. 5 and 6).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted or in the alternative, the rulings on summary judgment be set aside.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 250-59

(Decided December 1, 1960)

BAUER-SMITH DREDGING CO., INC., v.
THE UNITED STATES

T. G. Schirmeyer for plaintiff.

Clare E. Walker, with whom was *Assistant Attorney General George Cochran Doub*, for defendant. *Melford O. Cleveland* was on the brief.

On Plaintiff's and Defendant's Motions for Summary Judgment

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff had a contract with defendant to dredge a portion of the Gulf Intracoastal Waterway in Jefferson, Chambers, and Galveston Counties, Texas. The contract and specifications designated certain areas in which to deposit the spoil from the dredging. After the contract had been completed and accepted by defendant, certain landowners filed suit against plaintiff in the District Court of Jefferson County, Texas, alleging that plaintiff was negligent in its disposition of the spoil, to their damage. They alleged that plaintiff had deposited material in places not designated in the contract and also that it had allowed the spoil deposited in the designated areas to spill over into undesignated areas. They recovered a judgment against plaintiff herein for some sixty-odd thousand dollars. Plaintiff sues for reimbursement of said sum and for its cost of defending the suit.

Plaintiff was not the agent of the defendant in the performance of the work; it was an independent contractor. Plaintiff was required to furnish the necessary materials and to perform the dredging as set forth in the specifications. The Government exercised only such supervision over the performance of the work as was necessary to insure that it complied with the contract and specifications; otherwise plaintiff was at liberty to perform the work in any manner it saw fit. The Government was not interested in the method of performance, but only in the results required. Under such facts plaintiff was an independent contractor. See Restatement of the Law of Agency, section 438, comment i. Therefore, if plaintiff was negligent in the way it did the work required, there could be no obligation on the part of the Government to reimburse it for damages suffered as a result of its negligent performance of the contract.

Had plaintiff been defendant's agent in doing the work, the Government might be liable to reimburse the agent, if the agent had damaged the property of another in carrying out the instructions of the Government; but where the method of performing the work is left to the discretion of an independent contractor, there can be no such liability.

Moreover, whatever the legal relationship between plaintiff and defendant, the contract between them expressly provided—

> 11. *Permits and responsibility for work.* The contractor shall, without additional expense to the Government, obtain all required licenses and permits, and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance

except for any completed unit thereof which may theretofore have been finally accepted.

The District Court held the plaintiff negligent in the performance of the work and therefore responsible for the damage caused certain persons on account thereof, and this was affirmed by the Court of Civil Appeals.[1] Under section 11 of the contract set out above, it is made responsible for such damages.

A large part, if not all, of the damage done by the plaintiff was the result of allowing the spoil, or drainage therefrom, to get into a canal leading into a fresh-water reservoir which landowners in the vicinity used for the irrigation of their crops. The spoil was permeated by salt water and this salt water contaminated the fresh water in the reservoir and damaged the crops. The specifications relating to the disposal of excavated material read, in part—

> The contractor shall take such precautions, including construction of new levees and/or repair or raising of old levees, if deemed necessary to prevent spoil or waste water from flowing beyond the limits of the spoil disposal areas. All existing drainage outlets, both natural and artificial, shall be protected so that drainage will not be obstructed. If any material should enter a drainage outlet, it shall be promptly removed by the contractor at his expense. No material shall be allowed to enter any existing slip or small boat basin. [Specifications par. TP-3]

The fact that spoil or waste water flowed beyond the limits of the spoil disposal areas was one of the principal causes of damage suffered by the property owners in the

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[1] See **Bauer-Smith Dredging Co. v. Tully**, 305 S.W.2d 807.

vicinity. Other damage was caused, according to the findings of the Texas court, by the intentional act of the plaintiff in discharging spoil into the canal leading to the reservoir. This canal was not only not within the areas designated for the deposit of spoil but it was an area which the contractor was directed to protect against encroachment by the spoil or waste water.

There is, of course, no basis whatever for plaintiff's allegation that the defendant by acceptance of the work performed by plaintiff thereby assumed responsibility for any acts of negligence by it resulting in damage to others.

Plaintiff does not claim that the contamination of the water in the reservoir was a necessary incident to the deposit of the spoil in the designated areas. Such a claim, of course, would be untenable in view of the article of the specifications set out above and also in view of the finding of the Texas courts that the damage was the proximate result of plaintiff's negligence. Plaintiff's whole case is predicated on the judgment of the Texas courts and, hence, we treat the decision of the Court of Civil Appeals as final.

We find no basis upon which plaintiff can maintain an action against defendant. Therefore, its motion for summary judgment must be denied, the defendant's motion must be granted, and the plaintiff's petition must be dismissed.

It is so ordered.

D'TRFEE, *Judge*; LARAMORE, *Judge*; MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

NO. 250-59

BAUER-SMITH DREDGING CO., INC., Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant

PETITION
(Filed June 5, 1959)

TO THE HONORABLE, THE COURT OF CLAIMS

The above named plaintiff respectfully represents:

1. At all times hereinafter mentioned, plaintiff was a corporation duly organized and existing under the laws of the State of Texas, maintaining its principal place of business at Port Lavaca, Texas, and was engaged in the dredging business, including maintenance of the Gulf Intracoastal Waterway under the supervision and direction of the Corps of Engineers, U. S. Army.

2. On November 20, 1958, plaintiff presented its claim to the Contracting Officer, Corps of Engineers, U. S. Army, for reimbursement, restitution and indemnity for cash expended in handling third party damage claims and in defending litigation arising out of a trespass action filed by servient riparian landowners, their successors, assigns and lessees against plaintiff, and the payment of a judg-

ment entered of record in the aforementioned trespass action. The total amount expended by plaintiff was $101,-168.83. The expenditure of this sum of money is directly attributable to the fact that material information was omitted from the specifications and contract drawings. That in preparing its bid and in performing the dredging work covered by the contract and contract drawings, plaintiff necessarily relied upon the drawings submitted to available bidders. That there existed an implied warranty that such contract drawings, which were made a part of the dredging contract, accurately indicated "Spoil Disposal Areas" to be used by plaintiff. Furthermore, it was represented to plaintiff that defendant and its agents were authorized to deposit dredged materials in the disposal areas designated on the contract drawings. It was also represented to plaintiff that defendant's perpetual right and easement to deposit dredged material upon land adjoining the waterway would protect plaintiff against trespass and related actions filed by the grantor, his successors, assigns and lessees.

Defendant's failure to join plaintiff in the defense of third party litigation based upon trespass, wilful trespass, and negligent performance of the dredging contract herein described, materially affected plaintiff's defenses to such action and caused a substantial judgment to be entered against plaintiff.

3. The dredging contract referred to is identified as DA-41-243-eng.-1392, entered into on March 17, 1952 between plaintiff dredging company and defendant acting through the Corps of Engineers, U. S. Army. Article SW-1 of the contract described the work to be done in these words:

"(a) The work consists of furnishing all plant, labor, materials and equipment and performing all work in strict accordance with these specifications and the schedules and drawings for parts thereof for removing and disposing of all material lying above a plane 14 feet below mean low tide over a bottom width of 125 feet * * *."

"(b) The work to be performed under these specifications is located in the Gulf Intracoastal Waterway between a point near West Port Arthur, Texas and a point near High Island, Texas and extends through portions of Jefferson, Chambers and Galveston Counties, Texas."

4. According to the terms of the dredging contract, plaintiff acted in the capacity of an agent for defendant. Article SC-14 reads as follows:

"The work will be conducted under the general direction of the contracting officer and shall be subject to inspection by his appointed inspectors to insure strict compliance with the terms of the contract. * * *"

5. In reference to the disposal of excavated material, Article TP-3(f) provides as follows:

"Any material that is deposited elsewhere than in places designated or approved by the contracting officer will not be paid for, and the contractor may be required to remove such material and deposit it where directed at his expense."

As hereinafter alleged, the dredged material claimed to have been deposited in such a manner as to cause damage to property of third parties was actually deposited in places designated or approved by the Contracting Officer. That

third party property damage did not occur as a result of fault or negligence in plaintiff's prosecution of the dredging work, but was proximately caused by the fault or negligence and breach of warranty on the part of defendant, in that defendant failed to furnish plaintiff with proper specifications, instructions and contract drawings and failed to provide itself and its agents with a proper easement to deposit dredged material in the "Spoil Disposal Areas" designated on Sheet 5 of the contract drawings issued to plaintiff. Defendant's representations caused plaintiff to believe, and plaintiff did believe, that the easement acquired by defendant authorized the defendant and its agents to deposit dredged material upon the land in question. Acting upon defendant's representations, plaintiff was caused to incur expenses for which reimbursement is herein claimed.

6. Article GC-1 entitled "Scope of Work" required the plaintiff to perform all work required by Article 1 of the contract:

> " . . . in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof . . . ."

To the same effect, Article SC-5 provided that:

> "The work shall conform to the following contract drawings, and maps, all of which form a part of these specifications . . . ."

Sheet 5 of the contract drawings is identified by File No. IWW 1101-150 and is dated December, 1951 and was issued by the Department of the Army, Corps of Engineers, Office of the District Engineer, Galveston, Texas.

Sheet 5 is the only drawing applicable to the facts alleged in this petition and is one of a series of 18 drawings referred to in Article SC-5 of the dredging contract.

7. The dredging contract also provides that the estimated quantity of dredged material to be removed from the waterway is 3,100,000 cubic yards and the estimated cost of the contract dredging operation is $252,370.00. In response to defendant's invitation for bids, the plaintiff submitted a bid of $0.0814 per cubic yard to remove the above described dredged material and deposit same in "Spoil Disposal Areas" designated by defendant. Plaintiff's bid was accepted by defendant. The dredging work described in the contract was commenced within the time specified and was satisfactorily completed by plaintiff in accordance with the specifications, schedules and contract drawings prepared by defendant.

8. On September 23, 1952, defendant issued a "Certificate of Completion", certifying that the dredging work was completed to the satisfaction of defendant. This certificate, according to the procedure of the Corps of Engineers, is an approval, adoption and ratification by defendant of plaintiff's performance of its dredging contract. The certificate reads as follows:

> "This is to certify that BAUER-SMITH DREDGING CO., INC., P. O. Box BB, Port Lavaca, Texas, Contractor, completed on 15 September 1952, all work under Contract No. DA-41-243-eng.-1392 dated 17 March 1952 for dredging Gulf Intracoastal Waterway from Port Arthur Canal to High Island in Jefferson, Chambers and Galveston Counties, Texas, that the materials and labor were furnished in accordance with the terms of the specifications and contract; that all payrolls and guarantees have been furnished; THAT

THE WORK WAS CONSTRUCTED IN ACCORDANCE WITH THE ORIGINAL SPECIFICATIONS AND CONTRACT DRAWINGS AS MODIFIED BY APPROVED CHANGE ORDERS, AND SUPPLEMENTAL AGREEMENTS, WITH THE FOLLOWING EXCEPTIONS: (NONE) and it is recommended that the work under this contract be accepted by the contracting officer. (Emphasis supplied)

/s/ Glen F. Egan
Resident Engineer"

9. Defendant issued the above "Certificate of Completion" with full knowledge and notice of the complaint and demands then made by a servient riparian landowner, his successors and lessees. On October 4, 1952, plaintiff received its fifth and final payment for the satisfactory performance of the dredging contract. That the total amount received was $216,001.57. All payments were made in accordance with the terms of the contract and were made by defendant with full knowledge of the fact that third parties claimed that dredged material had been discharged into their alleged fresh water reservoir and irrigation system, neither of which are shown on the contract drawings. There is no dispute between plaintiff and defendant concerning the proper performance of the dredging contract and payment of services rendered. Plaintiff seeks to recover its expenses and disbursements paid because of its reliance upon defendant's acts and procedures, the easement acquired by defendant, and the proper performance of its dredging contract.

10. Defendant approved, accepted, adopted and ratified all dredging work performed by plaintiff, and is thereby estopped from denying that plaintiff properly deposited dredged material in the "Spoil Disposal Areas" designated

by defendant. All defenses based upon improper performances of the dredging contract have been waived by defendant. That plaintiff, acting upon the defendant's approval, acceptance and adoption of its dredging work and relying upon the terms of defendant's easement, contested the claims of servient riparian landowners, their successors, assigns and lessees, and was thereby caused to expend the sums of money herein claimed.

11. The easement relied upon was executed by McFaddin Trust on October 3, 1928. It granted to defendant, a perpetual right and easement to deposit dredged material upon the land claimed to be damaged. (Exhibit A, omitted from appendix.) The pertinent provisions of the deed are as follows:

> " . . . to enter upon and use any portion of said tract or parcel of land as herein conveyed, not so cut away and converted into public navigable water as aforesaid, for the deposit of dredged material, and for such other purposes as may be needful in the preservation and maintenance of the said work of improvement; *and the further perpetual right to deposit material during construction and maintenance of the waterway on the land of the parties of the first part adjoining the tract or parcel conveyed.*" (emphasis supplied)

In addition to the above easement, the parties of the first part, the servient riparian landowner, covenanted that they and their successors, assigns or lessees, would warrant the title to the easement and also covenanted that they would not interfere with or abridge the rights and easements conveyed to the party of the second part, the United States of America, which includes the right to discharge dredged material upon all of McFaddin's land

adjoining the Gulf Intracoastal Waterway, The deed provides:

> "Reserving, however, to the parties of the first part, their successors and assigns all such rights and privileges in said tract or parcel of land as herein conveyed and not converted into public navigable waters as may be used and enjoyed *without interfering with or abridging the rights and easements herein conveyed to the party of the second part.*" (Emphasis supplied)

The servient riparian landowner, his assigns and lessees further covenanted to waive and to release both the plaintiff and defendant from all damage claims. The deed provides as follows:

> ". . . to waive and release the United States of America, its officers, agents, servants and contractors from any and all claims for damages which may result from the careful and prudent construction and maintenance of the waterway, and the deposit of spoil or other matter as hereinbefore stated in a careful manner, this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the parties of the first part and on their successors in ownership of said land."

Exhibit A (omitted from printed Appendix) is a copy of the entire deed and easement executed by McFaddin Trust. Said document was duly recorded on August 19, 1929, in Deed Records of Jefferson County, Texas, Vol. 330, Page 132. The original deed is believed to be in defendant's possession and demand for its production is now made.

12. The land claimed to be damaged and the improvements thereon, include a "booting" rice crop located seven miles inland on elevated land, a vast fresh water reservoir

adjacent to the waterway and an extensive irrigation system. All of these improvements were located on grantor's land adjoining the Gulf Intracoastal Waterway, and encroached upon the paramount right granted in the easement held by defendant to deposit dredged material upon the land in question. Furthermore, grantors violated the terms of the easement, in that the improvements herein mentioned interfered with and abridged the rights and easements conveyed to and held by defendant. Moreover, said improvements encroached upon the "Spoil Disposal Area" designated by defendant on Sheet 5 of the contract drawings.

13. Notwithstanding, the provisions of the deed and easement granting defendant and its agents the right to deposit dredged material from the Intracoastal Waterway upon any part of McFaddin's land adjoining the waterway, the grantor of the easement, his successors, assigns and lessees, on August 11, 1953, commenced a trespass action against plaintiff. Said third party action was filed in the name of W. P. H. McFaddin, Jr., J. L. C. McFaddin, Mamie McFaddin Ward and husband, C. E. Ward, Camelia Blanchette McFaddin, DiVernon McFaddin Cordts and husband, E. G. Cordts, Perry McFaddin Duncan, Roy Tully, L. W. Tully and Ken Capps against Bauer-Smith Dredging Co., Inc., No. 66,631 in the 60th District Court of Jefferson County, Texas.

14. The servient riparian landowner and his lessees in their third party action alleged that plaintiff herein trespassed upon McFaddin's land adjoining the waterway when its hydraulic Dredge J. J. MANSFIELD deposited dredged material upon their land. It was also alleged that plaintiff performed its dredging contract with defendant in a negligent manner. These allegations were made nearly a year after the defendant certified that its dredging con-

tract with plaintiff was properly performed. The performance of plaintiff's dredging contract was unlawfully challenged by a party not in privity to it in a lawsuit where both parties to the dredging contract were not joined.

15. Plaintiff notified defendant of the claims made by third parties as soon as it learned that a fresh water reservoir encroached upon the "Spoil Disposal Area" designated by defendant. Defendant immediately inspected the area and concluded that the third party claims were unfounded. Subsequently, defendant refused to participate in any settlement negotiations or in litigation thereafter filed by third party claimants against plaintiff. Defendant's refusal was based upon the ground that the McFaddin deed and dredging easement barred third party claims and absolved defendant from legal liability.

16. After the third party damage claim was filed, plaintiff filed removal proceedings in the United States District Court for the Eastern District of Texas, Beaumont Divison, in order that the defendant herein could be impleaded and joined to defend the riparian landowner's trespass action. On motion to remand, the case was returned to the Texas State Court. Thus, for jurisdictional reasons, the defendant could not be made a party to the lawsuit filed against the plaintiff herein. Defendant steadfastly refused to join the litigation involving its easement and its dredging contract. Defendant's failure to join the litigation against plaintiff, materially affected plaintiff's defenses in the third party damage actions and left plaintiff at the mercy of a local state court jury. A verdict of $60,-631.51, plus interest and court costs, was awarded the riparian landowner, his successors, assigns and lessees. Subsequent appeals were taken to all available appellate courts. Ultimately, the jury verdict was sustained.

17. On October 20, 1958, the judgment of the 60th District Court of Texas for simple trespass and wilful trespass on defendant's easement was satisfied by plaintiff paying the sum of $70,029.45, to the servient riparian landowner, his successors, assign and lessees, heretofore named. A satisfaction of judgment was thereupon entered of record, a copy of which is attached as Exhibit B. (Omitted from Appendix)

18. That prior to the filing of the third party damage lawsuit, plaintiff expended the sum of $4,008.56 to minimize alleged damages to third party claimant's irrigation system located on defendant's easement and in "Spoil Disposal Areas" designated on Sheet 5 of the contract drawings. Plaintiff incurred this expense as a result of furnishing men and large pumps in an attempt to reduce the salt content of water in third party's reservoir and ditches.

19. When it became apparent that third party legal action would be asserted against plaintiff, an extensive legal investigation was made of the law and the facts. Numerous conferences were had with third party attorneys and also with officials of the United States. After a third party lawsuit was filed, a removal proceeding was commmenced. That the legal fees and expenses paid over the first 2½ year period following the deposit of dredged material herein described was $4,252.18.

20. That an extended trial of the third party trespass action was held at Beaumont, Texas from February 20, 1956 to March 6, 1956. The law firm of Keith, Mehaffey, McNicholas & Weber of Beaumont, Texas submitted a statement for legal services rendered and expenses incurred in the amount of $8,224.37. That plaintiff found said bill to be reasonable and it was paid. That subsequently, the law firm of Keith, Mehaffey, McNicholas & Weber ap-

pealed the third party action to the Ninth Court of Civil Appeals at Beaumont, Texas and submitted a statement of $3,607.17 for legal services and expenses. This sum was found to be reasonable and was paid. That the cost of an appeal record, appeal bond and premiums, payment for printed briefs for an appeal to the Ninth Court of Civil Appeals, Texas Supreme Court and United States Supreme Court, expenses and disbursements amounted to $6,376.65. Plaintiff found said biill to be reasonable and it was paid. That a legal fee of $4,670.45 was paid to T. G. Schirmeyer for legal services rendered and expenses incurred in taking an appeal to the Texas and United States Supreme Court. This sum, plaintiff found to be reasonable and payment was made. That the total amount of investigation and litigation expense paid in connection with third party claims for a period of about 6 years amounted to $27,-130.82, making the total amount of plaintiff's claim $101,168.83.

21. Plaintiff submitted its claim to the Contracting Officer, Corps of Engineers, U. S. Army, on November 20, 1958, within the time allowed for filing a claim. By letter dated December 3, 1958, from the District Engineer, Corps of Engineers, U. S. Army, the plaintiff was advised that a decision by the Contracting Officer could not be rendered. On January 27, 1959, plaintiff was advised by the Division Engineer, Corps of Engineers, U. S. Army, as follows:

> "The record show that final settlement under the contract in question was effected September 23, 1952, which rendered the administrative claims and appeals procedure under the contract inoperative. The only remaining administrative procedure available is consideration of the claim by the General Accounting Office."

22. On March 17, 1959, the General Accounting Office sent a "Settlement Certificate" to plaintiff disallowing plaintiff's claim on the grounds that (a) plaintiff was required by Provision GC-2 of the dredging contract to have knowledge of the nature and location of the work (b) plaintiff failed to prevent spoil and waste water from flowing beyond the limits of the spoil areas as required by provision TP-3(a), (c) that the trial court, in a third party action in which defendant refused to be a party, found plaintiff guilty of trespass upon a federal dredging easement and therefore, under Paragraph 11 of the contract, plaintiff is responsible for damages to persons and property that occur as a result of the dredging contractor's fault or negligence in connection with the prosecution of the work. The latter grounds relied upon by the General Accounting Office completely disregards all questions of fault, negligence, breach of warranty and the contractual legal duty of defendant, as principal, to plaintiff, its agent. The General Accounting Office disregarded the implied warranties made by defendant and the fact that defendant was not a party to the third party action against plaintiff and is estopped from setting up the defense of negligent performance of the dredging contract after it certifies completion, acceptance and approval of the performance of the contract. Moreover, defendant had by its acts, adopted plaintiff's performance of the dredging contract and thereby waived the defenses relied upon. The last paragraph of Section SC-15 of the contract provides:

> "Final acceptance of the whole or a part of the work and the deductions or corrections of deductions made thereon will not be reopened after having once been made, except on evidence of collusion, fraud or obvious error . . ."

There is no evidence of collusion, fraud or obvious error, and such evidence was not indicated by the General Accounting Office. Therefore, by the terms of the contract, the question of satisfactory performance of the dredging contract cannot be reopened or repudiated by defendant.

23. Defendant having received the benefits of the dredging contract and having adopted and ratified the acts of its agent, the plaintiff herein, after being placed on notice of the acts of its agent and after plaintiff relied upon defendant's acceptance of its acts, is either estopped from relying upon defenses enumerated by the General Accounting Office or has waived same. The disallowance of plaintiff's claim on the grounds stated by the General Accounting Office is not supported by substantial evidence and is arbitrary, capricious, grossly erroneous, lacks finality and is contrary to fundamental principles of law for the reasons hereinafter alleged.

24. The General Accounting Office, in relying on Paragraph 11 of the dredging contract to support a disallowance of plaintiff's claim, failed to quote that part of Paragraph 11 which provides that plaintiff is responsible for the dredging work performed until defendant accepts it. The omitted portion of Paragraph 11 provides that plaintiff:

> ". . . shall be responsible for all materials delivered and work performed *until completion and final acceptance*. . . ." (Emphasis supplied)

The intent of the parties, as expressed in this portion of Paragraph 11, was to make defendant, not plaintiff, responsible for any costs, expenses and disbursements incurred by plaintiff as a result of third party claimants, provided that the dredging work performed by plaintiff was completed to defendant's satisfaction and finally ac-

cepted by defendant. The acceptance and approval of the dredging work constitutes adoption and ratification by defendant of the manner in which plaintiff performed its dredging contract.

25. Contrary to the conclusion reached by the General Accounting Office, plaintiff fully complied with Provision GC-2 entitled "Site Investigation and Representation". The pertinent terms of this provision are as follows:

> "The contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, particularly these bearing upon transportation, disposal, handling and storage of materials . . . the conformation and conditions of the ground . . . and all other matters upon which information is reasonably obtainable and which can in any way affect the work or the cost thereof under this contract."

26. Pursuant to the provisions of GC-2 of the dredging contract, plaintiff made a careful inspection of the dredging site prior to submitting its bid. This inspection was made after receiving defendant's invitation No. CIVENG-41-243-52-53 issued on January 16, 1952.

The natural drainage of water was observed to be from north to south toward the Gulf of Mexico, only a few miles south of that portion of the Gulf Intracoastal Waterway under consideration. No structure or improvement was visible. It was found, by sight observation, that the land adjoining the waterway, where the alleged trespass on defendant's easement occurred, is a vast impassable and uninhabitable salt grass marsh. The fresh water reservoir or irrigation system claimed to be damaged was not visible from defendant's right of way and could not be discovered by reasonable examination of the site. The

land in the area adjacent to the waterway is flat and soggy and is about level with the surface of the water in the waterway. The top of the levees, built on defendant's right of way, are approximately 5 to 10 feet high. As far as the eye could see, salt marsh grass was the only visible vegetation. Trees, shrubs or other vegetation do not grow in the area adjacent to the waterway.

25. The Gulf Intracoastal Waterway covered by the dredging contract runs in a general east and west direction. It was observed that drainage culverts, openings and spillways were constructed in the levee along the north edge of the waterway in order to permit water to drain into the Gulf Intracoastal Waterway. After the servient riparian landowner and his assigns claimed damages to their fresh water reservoir and irrigation system, it was discovered that drainage culverts in the levee had been blocked off or removed and that third party claimants blocked off defendant's spillway to prevent the natural drainage of Star Lake into the Gulf Intracoastal Waterway.

26. That prior to the preparation and submission of its bid, plaintiff's representatives carefully examined and studied the contract drawings submitted by defendant. No fresh water irrigation system or fresh water reservoir was shown on Sheet 5 of defendant's contract drawing. It was noted that the north and south canal, indicated on Sheet 5 reference station 828, is shown to be only 1500 feet in length and stops short of what is indicated to be the remains of Star Lake. It was later discovered that the old bed of Star Lake was part of servient riparian landowner's fresh water reservoir. That it was reasonable and proper for a prudent person to assume that the riparian landowner would not unlawfully make use of the de-

fendant's levee, located on defendant's right of way, without first obtaining permission to do so from defendant. Plaintiff relied upon the fact that if such permission was granted then defendant would notify plaintiff of any encroachment upon the easement heretofore described. After trespass damages were claimed, it was determined that defendant had not authorized the servient riparian landowner, his successors, assigns or lessees to construct a fresh water reservoir and irrigation system alongide its levees in such a manner as to interfere with the natural drainage of the land covered by the easement and at the same time encroach upon defendants designated "Spoil Disposal Areas".

27. Defendant's contract drawing No. 5 clearly indicates that there was no northern limit to the disposal areas designated by defendant in the area where the riparian landowner claimed property damage. The hatch lines in the "Spoil Disposal Areas" were open and not closed. According to defendant's engineering procedures, whenever spoil disposal area hatch lines were left open there is no limit to disposal areas in the direction of the open hatch lines. Thus, defendant's contract drawing led plaintiff to believe that defendant did not wish to limit the deposit of dredged material in a northerly direction. Plaintiff relied on defendant's contract drawings and was thereby caused to act to its detriment.

28. That prior to the actual dredging operations, plaintiff again inspected the dredging site, including the 1500 foot canal near reference station 828, on Sheet 5 of the contract drawings. This canal was found to be a borrow ditch and not a canal. It was later admitted by the servient riparian landowner that he dug the ditch in order to build a cattle road so that he could move his cattle

from the waterway across the swampy area, known as Star Lake, to higher ground several miles inland. Plaintiff observed that it was physically impossible for dredged material or water discharged from the spill barge of the hydraulic Dredge J. J. MANSFIELD to drain or flow uphill to the high ground north of the waterway. Subsequently, it was discovered that it was physically impossible for water to flow northward into connecting ditches.

29. As stated above, immediately after the servient riparian landowner's lessee claimed that his rice crop would be damaged by the dredging operations of the J. J. MANSFIELD, defendant's Resident Engineer, Glen F. Egan, inspected the dredging work in the area where it was later claimed that plaintiff trespassed upon defendant's easement. Defendant's representative as a result of such inspection found that the dredging contract was properly performed according to defendant's specifications and contract drawings. Defendant's representative, Glen F. Egan, made the following statement under oath on January 30, 1956:

> "I personally inspected the ditch and surrounding area in the presence of Roy Tully, the major plaintiff in this suit, and Captain Schilling, who worked for Bauer-Smith, a few days after the two pumping incidents involved in this suit had occurred and determined that drainage had not been obstructed and *that Bauer-Smith Dredging Company had not gone beyond its authority under the contract.* If, in my opinion as a representative of the Contracting Officer, drainage had been obstructed, I could have issued instructions to Bauer-Smith Dredging Company to remove same at its own expense. This was not necessary, and such instructions were not issued."

A copy of the entire affidavit of Glen F. Egan, Area Engineer, Port Arthur Area Office, Corps of Engineers, U. S. Army, Port Arthur, Texas, dated January 30, 1956, is hereto attached as Exhibit C and is made a part hereof.

30. Visual examination of the area failed to disclose a fresh water reservoir, an irrigation system, ditch, cultivated land, rice fields, or habitation. Nothing unusual was observed in the coastal salt grass marshes along the Intracoastal Canal which would lead a person of ordinary prudence to conclude that the land in question could be damaged by dredged material being discharged from the spill barge astern of the hydraulic Dredge J. J. MANSFIELD. The discharge line from the dredge was suspended by an "A" frame erected on the spill barge so that the end of the discharge line would just clear the levee along the bank of the waterway. The maximum flow of discharged material from the end of the discharge pipe was 400 to 600 feet.

31. Plaintiff strictly complied with the terms of the dredging contract herein described and defendant accepted and approved of the dredging work performed by plaintiff without exception. Defendant thereby adopted, as its own, all acts of omission or commission on the part of plaintiff and ratified plaintiff's performance of its contract. A portion of the affidavit of defendant's Contracting Officer, Colonel J. D. Lang, U. S. Army, Retired, reads as follows:

> "The contract was performed under my general direction in accordance with my prescribed procedures and was properly inspected by my appointed inspector, Glen F. Egan, to insure strict compliance with the contract. When the contract was completed, I officially received a Certificate of Completion from Glen F. Egan which stated that the contract had been fully

completed in a satisfactory manner by the Bauer-Smith Dredging Co., Inc. The Certificate of Completion indicated that no exceptions were noted or found. *The contract was certified by me as satisfactorily completed in accordance with its terms. Bauer-Smith Dredging Co., Inc., did execute the contract to completion, in accordance with the plans and specifications; all materials removed from the Intracoastal Canal were considered to be dumped in the proper disposal areas, including the dumping of spoil on the McFaddin Trust lands, and payment therefore was approved.*" (Emphasis supplied)

A copy of the entire affidavit of Colonel J. D. Lang is attached as Exhibit D and is made a part hereof.

32. The conclusion reached by the General Accounting Office that plaintiff failed to prevent dredged material from flowing beyond the designated "Spoil Disposal Areas" is clearly erroneous and contrary to sworn statements made by defendant's representatives. As between plaintiff and defendant, it is an admitted and uncontested fact that no spoil or waste water flowed beyond the limits of the spoil areas designated by defendant. All drainage outlets, if any, both natural and artificial, were protected by plaintiff so that drainage was not obstructed. "No Material", as that term is used in the dredging contract and drawings and as construed by the Contracting Officer, entered any drainage outlet, nor was defendant's attention directed to any dredged "material" entering a drainage ditch, canal or outlet. Plaintiff complied in all respects with Provision TP-3(a) entitled "Disposal of Excavated Material." Furthermore, defendant is estopped from asserting that the plaintiff did not comply with this section of the contract after defendant has accepted, approved and adopted the dredging service rendered by plaintiff and after plaintiff

relied upon such approval to its detriment. Section TP-3 (a) of the dredging contract provides:

> "The material excavated shall be transported and deposited in the spoil disposal areas shown on the drawings referred to in Paragraph SC-5, Contract drawings, maps and specifications. The maximum distance to which the material will have to be transported will not exceed 2,500 feet and the average distance will not exceed 400 feet.
>
> "The contractor shall take such precautions, including construction of new levees and/or repair or raising of old levees, if deemed necessary to prevent spoil or waste water from flowing beyond the limits of the spoil disposal areas. . . ."

33. There being no northern limits to the spoil disposal area indicated on the contract drawings, no new levees were deemed necessary by either plaintiff or defendant. It was not necessary or prudent for plaintiff to go beyond the precautions exercised on the occasions in question, as hereinafter described.

34. During the late afternoon of July 18, 1952, when the Dredge J. J. MANSFIELD approached a barbed wire fence, determined to be the west boundary line of the servient riparian landowner's land, the spill barge of the Dredge J. J. MANSFIELD was shifted from the north to the south edge of the waterway. At this time, the spill barge was 800 to 1000 feet west of the north and south canal at Station 828, Sheet 5. The spill barge was shifted because one of the third party claimants boarded the Dredge J. J. MANSFIELD and demanded that dredging operations cease or that dredged material be deposited elsewhere than on the north bank of the waterway as his rice crop would be affected by salt water. The following morn-

ing, Saturday, July 19, 1952, after passing the borrow ditch or canal and a levee at Station 827, indicated on Contract Drawing No. 5, the spill barge was shifted back to the north bank and dredged material was deposited in the "Spoil Disposal Area" designated by defendant. On July 20, 1952, one of the third party claimants, advised the operator of the Dredge J. J. MANSFIELD that dredged material was being deposited in his fresh water reservoir located in defendant's "Spoil Disposal Area", east of the north-south levee at Station 827. This was the first knowledge plaintiff had of a fresh water reservoir being located adjacent to defendant's levees on the north bank parallel to the waterway. There was no indication on defendant's contract drawing or any other available chart that a 3000 acre fresh water reservoir was located alongside the waterway and that about three (3) miles of defendant's levee was being unlawfully used as the south enclosure of a vast fresh water reservoir.

Upon learning of the error made by defendant in the preparation and submission of its contract drawings and designation of "Spoil Disposal Areas", plaintiff immediately suspended dredging operations and moved to a new location.

35. The plaintiff's dredging superintendent and defendant's representative, Glen F. Egan, and the lessee of the land in question inspected the alleged damage to the irrigation project constructed for the servient riparian landowner. It was then and there determined that the best approach to a solution of the problem at hand, was for plaintiff to move some large pumps to accessible shore locations and attempt to remove salt water from the reservoir and minimize the rice farmer's anticipated damages. The rice fields, later alleged to be damaged, were unidentified

but were stated to be some seven miles inland on elevated land. As between plaintiff and defendant, there was no disagreement that plaintiff strictly complied with defendant's plans, specifications, dredging contract and contract drawings, and it was mutually understood that the alleged damage claimed by the servient riparian landowner, his successors, assigns and lessees, did not occur as a result of plaintiff's fault or negligence *but occurred as a normal and necessary act incidental to the prosecution of the dredging work required under the terms of the dredging contract.* Upon completion and final acceptance of plaintiff's work, no exception was taken of any failure on the part of plaintiff to perform its dredging contract with the defendant in a proper manner.

36. Plaintiff is the owner of this claim; no assignment or transfer has been made. No action upon this claim has been had before Congress or any department of the government not named in this petition.

37. That this claim is founded upon an express contract with the United States and jurisdiction of this Court is invoked under the Act of Congress of June 25, 1948, 28 U.S.C. 1491.

WHEREFORE, plaintiff demands judgment against the United States of America for damages it sustained in the total amount of $101,168.83 and interest thereon and reasonable costs and disbursements and for such further relief as may seem just and proper.

T. G. SCHIRMEYER
T. G. Schirmeyer
761 San Jacinto Building
Houston 2, Texas
Attorney for Plaintiff

APPENDIX C

AFFIDAVIT OF GLEN F. EGAN

THE STATE OF TEXAS §
§
COUNTY OF GALVESTON §

BEFORE ME, the undersigned authority, on this day personally appeared GLEN F. EGAN, known to me to be a credible person, and being by me first duly sworn, upon oath, deposes and says as follows:

My name is Glen F. Egan. I am over twenty-one years of age, am of sound mind, have never been convicted of any crime or offense, and have personal knowledge of every statement herein made, and am fully competent to testify in the matters stated herein.

1.

I held the position of Area Engineer, Port Arthur Area Office, Corps of Engineers, U. S. Army, Port Arthur, Texas. With respect to the contract executed between the United States Government and the Bauer-Smith Dredging Co., Inc., at all times pertinent hereto, I was the authorized representative of the Contracting Officer in charge of field inspection. A copy of said contract, together with the specifications made a part thereof, is attached hereto and made a part hereof. Sheet No. 5 of 18 of the plan sheets made a part of the contract is also attached hereto and made a part hereof. Other plan sheets are not attached for the reason that they are not deemed pertinent to the matter in controversy.

2.

The plans and specifications made a part of said contract for the maintenance and dredging of the Gulf-Intra-

coastal Waterway between Port Arthur, Texas, and High Island, Texas, were prepared under my direction in the latter part of 1951. The plans and specifications were reviewed and advertised for bids by the Office of the District Engineer, Corps of Engineers, Galveston, Texas. The Bauer-Smith Dredging Company was low bidder on the work when the bids were opened on February 28, 1952. Work under the contract was started near High Island, Texas, by the Bauer-Smith Dredge "J. J. MANSFIELD" on May 22, 1952, with the dredge working easterly toward Port Arthur. These plans and specifications were drawn and prepared with the knowledge that the United States had a right of way and easement on the McFaddin Trust lands to complete the dredging contract, including the dumping of spoil and dredge waste on the areas marked as "SPOIL DISPOSAL AREA" on the Sheet No. 5 attached hereto and made a part hereof. In fact, the Bauer-Smith Dredging Company had no authority to dump other than in the places marked as disposal areas unless it first obtained written permission of the landowner of the substituted area before proceeding with the work, and was given approval to do so by the Contracting Officer.

3.

The right of way and easement applicable when the plans and specifications were prepared are set out in the instrument executed by W. P. H. McFaddin, W. P. H. McFaddin, Jr., and J. L. C. McFaddin on the 3rd day of October, 1928, and filed of record August 19, 1929, with the County Clerk of Jefferson County, Texas.

4.

When field preparation of the plans and specifications had been virtually completed, advance prints of the plan

sheets were obtained and survey parties from this office walked along the canal bank over the entire job to ascertain if any topographic features existed that were not shown on the plans. Several fences, ditches, levees, etc., were discovered in this manner and were located and subsequently indicated on the plans. A levee and borrow ditch, not previously shown, were found extending northerly from the north bank of the canal about opposite reference line 828+00, as shown on Sheet No. 5 attached hereto. Since the existence of the water reservoir was not shown at that time, no particular significance was attached to the levee and borrow ditch. Structures of this type are found at numerous locations in marsh areas in this general vicinity. Commonly, they are constructed for drainage or transportation through the marsh area. Also the existence of standing water in marsh areas is common, and discovery of such would not ordinarily cause undue concern or cause further inquiry. The levee and borrow ditch were added to Sheet No. 5 of the drawings and I caused a note to be added that the contractor should not allow material to enter the ditch. The purpose of the statement was to prevent solid materials entering the ditch to the extent that drainage would be obstructed. This was consistent with established Corps of Engineers policy that wherever possible dredging operations shall be planned and conducted in such manner that established natural or artificial drainage shall not be impeded.

5.

I personally inspected the ditch and surrounding area in the presence of Roy Tully, the major plaintiff in this suit, and Captain Schilling, who worked for Bauer-Smith, a few days after the two pumping incidents involved in

this suit had occurred, and determined that drainage had not been obstructed, and that Bauer-Smith Dredging Company had not gone beyond its authority under the contract. If, in my opinion as a representative of the Contracting Officer, drainage had been obstructed, I could have issued instructions to the Bauer-Smith Dredging Company to remove the same at its own expense. This was not considered necessary, and such instructions were not issued.

6.

I did not know anything about any rice farming operations nor about the existence of any irrigation system, nor the existence of a reservoir on the McFaddin lands until Mr. Perry McFaddin called me by telephone after both of the incidents complained of had already occurred. In fact, to this date, I still do not know of any other reservoirs existing anywhere along the Intracoastal Canal between Port Arthur and High Island.

7.

My impression of Roy Tully's description of the situation and conversation when I talked to him about the two incidents involved in this suit was that his sole concern was to get the borrow ditch free of salt water. I do not recall that he made any complaint to me about any solid material getting into the borrow ditch at that time nor at any other time.

8.

The Government contract provided that the work would be done in accordance with the terms of the contract and plans and specifications which were parts thereof. It was my duty as the authorized representative of the United

States Contracting Officer under Paragraph SC-14 of the specifications to insure strict compliance with the terms of the contract. I fulfilled these duties and when the project was completed, I executed a Certificate of Completion and submitted the same to my superior, the Contracting Officer, to establish that the contract from a field inspection standpoint had been fully completed in a satisfactory manner by the Bauer-Smith Dredging Company and to recommend acceptance of work under the contract. No exceptions were noted or found.

/s/ GLEN F. EGAN
Glen F. Egan
Formerly Area Engineer, Port Arthur
Area Office, Corps of Engineers,
U. S. Army, Port Arthur, Texas
Currently Office of the District
Engineer
Galveston District
Galveston, Texas

SUBSCRIBED AND SWORN TO before me the said GLEN F. EGAN on this the 30th day of January, A. D. 1956, to certify which witness my hand and seal of office.

/s/ C. L. Heard
Notary Public in and for
Galveston County, Texas

AFFIDAVIT OF COLONEL J. D. LANG
U. S. ARMY, RETIRED

THE STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned authority, on this day personally appeared COLONEL J. D. LANG, U. S. Army, Retired, known to me to be a credible person, and being by me first duly sworn, upon oath, deposes and says as follows:

My name is J. D. Lang. I am over twenty-one years of age, am of sound mind, have never been convicted of any crime or offense, and have personal knowledge of every statement herein made, and am fully competent to testify in the matters stated herein.

1.

With respect to the contract executed in 1952 between the United States of America and the Bauer-Smith Dredging Co., Inc., for the dredging of the Gulf-Intracoastal Waterway between Port Arthur, Texas and High Island, Texas, I was the duly authorized Contracting Officer for the United States of America and executed the contract in that capacity. Furthermore, I continued in that capacity during all of the contract period and until after the final termination of the contract.

2.

Glen F. Egan was during all of the contract period my duly authorized representative in charge of field inspection under the contract.

3.

Glen F. Egan was prior to and during said contract period the Area Engineer, Port Arthur Area Office, Corps of Engineers, U. S. Army, at Port Arthur, Texas. The preliminary plans and specifications as well as the actual on-the-job-site supervision and inspection were performed by Glen F. Egan as my authorized representative.

The plans and specifications including the designation of disposal areas as drawn and prepared were approved by me. They were predicated upon the right of way and easement granted the United States of America which was executed by W. P. H. McFaddin, W. P. H. McFaddin, Jr., and J. L. C. McFaddin on the 3rd day of October, 1928, and filed of record on August 19, 1929 with the County Clerk of Jefferson County, Texas.

4.

The plans and specifications provided certain disposal areas where Bauer-Smith Dredging Co., Inc., could dump material and water pumped from the canal. Bauer-Smith Dredging Co., Inc., could not dump anywhere else without first obtaining written permission of the landowner of the substituted area and getting my approval as Contracting Officer.

5.

The contract performed under my general direction in accordance with my prescribed procedures and was properly inspected by my appointed inspector, Glen F. Egan, to insure strict compliance with the contract. When the contract was completed, I officially received a Certificate of Completion from Glen F. Egan which stated that the contract had been fully completed in a satisfactory man-

ner by the Bauer-Smith Dredging Co., Inc. The Certificate of Completion indicated that no exceptions were noted or found. The contract was certified by me as satisfactorily completed in accordance with its terms. Bauer-Smith Dredging Co., Inc., did execute the contract to completion, in accordance with the plans and specifications; all materials removed from the Intracoastal Canal were considered to be dumped in the proper disposal areas, including the dumping of spoil on the McFaddin Trust lands, and payment therefore was approved.

/s/ J. D. LANG
J. D. Lang, Colonel, U. S. Army,
Retired
Formerly District Engineer, Corps
of Engineers, U. S. Army,
Galveston District
Galveston, Texas

SUBSCRIBED AND SWORN TO before me by the said J. D. LANG on this the 29th day of November, A. D. 1955, to certify which witness my hand and seal of office.

/s/ CORALEA WALKER
Notary Public in and for
Bexar County, Texas

SUPREME COURT, U. S.

FILED
JUN 27 1961
JAMES R. BROWNING, Clerk

No. 121

In the Supreme Court of the United States

OCTOBER TERM, 1961

BAUER-SMITH DREDGING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, JR.,
Assistant Attorney General,
JOHN G. LAUGHLIN, JR.,
KATHRYN H. BALDWIN,
Attorneys, Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Alexander v. *Frost Lumber Industries, Inc.*, 88 F. Supp. 516, affirmed, 187 F. 2d 27	6
Bauer-Smith Dredging Co. v. *Roy Tully, et al.*, 305 S.W. 2d 805, certiorari denied, 358 U.S. 842	4, 5
Gallagher v. *United States Lines Co.*, 206 F. 2d 177	6
Kirk v. *United States*, 270 F. 2d 110	7
Plumley v. *United States*, 226 U.S. 545	10
United States v. *Moorman*, 338 U.S. 457	10
Yearsley v. *W. A. Ross Construction Co.*, 309 U.S. 18	7

Statute:

41 U.S.C. App. 54.13	10

Miscellaneous:

30A Am. Jur., *Judgments*, § 424, p. 477	9
42 C.J.S., *Indemnity*, § 32(2)b, p. 619	9
Restatement, Second, Agency:	
§ 438	7
§ 439	7
§ 440	7
Restatement of Judgments, § 107, comment h, p. 517	9

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 17-20) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1960. On March 1, 1961, the court denied a motion for rehearing. The petition for a writ of certiorari was filed on May 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner was entitled to indemnity from the United States for amounts paid by it to third

parties for damages resulting from its negligent performance of a government contract.

STATEMENT

On March 17, 1952, petitioner entered into a contract with the government for the dredging of a portion of the Gulf Intracoastal Waterway in Texas. The contractor was to furnish the material and perform the work as described in paragraph SW-1 of the specifications, which provided:

> (a) The work consists of furnishing all plant, labor, materials and equipment and performing all work in strict accordance with these specifications and the schedules and drawings for parts thereof for removing and disposing of all material lying above a plane 14 feet below mean low tide over a bottom width of 125 feet * * *. [Pet. 23.]

Paragraph SC-5 of the specifications required the work to conform to certain contract drawings and maps, of which Sheet No. 5 of the drawings is applicable to this controversy (Pet. 25). A levee and a ditch which lead into a reservoir used by landowners in the vicinity for irrigation (Pet. 19), were shown on Sheet 5.[1] This drawing contained a statement that no material should be allowed to enter this ditch (Pet. 46). It also stipulated that none of the material and water pumped from the waterway were to be deposited other than in the "spoil disposal areas" shown on the drawings (Pet. 50).

---

[1] These are referred to in the Court of Claims opinion as the "canal."

Paragraph TP-3 of the specifications, pertaining to the disposal of the excavated material, read in part:

> The contractor shall take such precautions, including construction of new levees and or repair or raising of old levees, if deemed necessary to prevent spoil or waste water from flowing beyond the limits of the spoil disposal areas. All existing drainage outlets, both natural and artificial, shall be protected so that drainage will not be obstructed. If any material should enter a drainage outlet, it shall be promptly removed by the contractor at his expense. No material shall be allowed to enter any existing slip or small boat basin. [Pet. 19.]

Article 11 of the contract provided:

> *Permits and responsibility for work.* The contractor shall, without additional expense to the Government, obtain all required licenses and permits, and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance except for any completed unit thereof which may theretofore have been finally accepted. [Pet. 18-19.]

On September 23, 1952, the government's resident engineer issued a certificate of completion which stated in part that "the work was constructed in accordance with the original specifications and contract drawings as modified by approved change orders, and supple-

mental agreements," and recommended that the work be accepted by the contracting officer (Pet. 26-27). The latter certified the contract as satisfactorily completed in accordance with its terms; and stated that all materials removed from the waterway in the course of the dredging "were considered to be dumped in the proper disposal areas" (Pet. 51). On October 4, 1952, petitioner received final payment under the contract (Pet. 26).

On August 11, 1953, third parties commenced an action for damages against petitioner in a State court in Texas, alleging that petitioner was negligent in its disposition of the spoil. More particularly, they alleged that petitioner deposited material in places not designated in the contract, and also that it had allowed the spoil deposited in the designated areas to spill over into undesignated areas. The jury found that petitioner was negligent in permitting spoil and salt water to enter the fresh water canal shown on Sheet 5 of the drawings; that such negligence was a proximate cause of the third parties' damage; and that petitioner intentionally pumped spoil and salt water into the third parties' fresh water reservoir. Judgment of approximately $60,000 was rendered against petitioner (Pet. 30).

The Texas Court of Civil Appeals affirmed. It held, *inter alia*, that "the evidence supports the findings of the jury that the appellant was negligent in the performance of his contract and exceeded the authority granted and directions given in its contract with the government." The court also noted that "in none of its points of error on appeal does the appellant com-

plain of the sufficiency of the evidence in any way". *Bauer-Smith Dredging Co. v. Roy Tully, et al.*, 305 S.W. 2d 805, 816, certiorari denied, 358 U.S. 842.

In November 1958, petitioner submitted a claim to the contracting officer for the amount of the State court judgment and its expenses in defending the suit. The government informed petitioner that the final settlement of the contract in 1952 had rendered inoperative the administrative claims and appeals procedure under the contract. Thereafter, a claim filed by petitioner with the General Accounting Office was denied on the merits (Pet. 32-33).

On June 5, 1959, petitioner commenced this action in the Court of Claims. It sought recovery on the theory that it was the agent of the United States in the dredging operations; that it had performed the contract in accordance with the specifications and contract drawings, as evidenced by the government's certificate of completion and the acceptance of the work; that by such certificate and acceptance the government had adopted and ratified the acts of petitioner in the performance of the contract; and that petitioner was entitled, as a matter of law, to indemnity for the amounts expended by it in connection with the suit by the third parties.

Both parties moved for summary judgment. In a unanimous opinion, the Court of Claims denied petitioner's motion for summary judgment, granted the government's motion, and dismissed the petition. The court held, *inter alia*, that petitioner was not the agent of the government, but was an independent contractor; that, whatever the legal relationship between the

contracting parties, the contract expressly made petitioner responsible for all damages to persons or property that occurred as a result of its fault or negligence; that the judgment upon which petitioner's whole case was predicated was based upon petitioner's negligence as the proximate cause of the third parties' damages; and that there was "no basis whatever" for petitioner's contention that by acceptance of the work the government assumed responsibility for such acts of negligence by petitioner (Pet. 17-20).

ARGUMENT

This case presents no question of general or public importance in the field of government contracts warranting review by this Court. The decision below turns on the particular facts involved; it is clearly correct; and there is no conflict.

1. The Court of Claims correctly held that, under the specific provisions of the contract requiring petitioner to furnish "all plant, labor, materials and equipment" and to perform "all work" as set forth in the specifications, petitioner was not the agent of the government but, rather, was an independent contractor. The mere fact that the government exercised general supervision over the work, in order to insure that it was being properly performed, did not, in itself, make the contractor the agent of the government, or make the latter liable to third parties for the contractor's negligence. *Alexander* v. *Frost Lumber Industries, Inc.*, 88 F. Supp. 516 (W.D. La.), affirmed, 187 F. 2d 27 (C.A. 5); cf. *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177 (C.A. 2). Nor is the government liable

for petitioner's negligence because Congress made the Secretary of the Army responsible for the dredging of navigable rivers. Cf. *Kirk* v. *United States*, 270 F. 2d 110, 117 (C.A. 9). *Yearsley* v. W. A. *Ross Construction Co.*, 309 U.S. 18, does not hold, as petitioner suggests (Pet. 12), that every contractor on a federal dredging project is automatically an agent of the government.[2]

As an independent contractor, petitioner was not entitled to reimbursement from the government for the damages it incurred due to its own negligent performance of the contract. In any event, under settled principles of agency, a principal is not required to indemnify his agent where, as here, the agent's harmful acts were of no benefit to the principal and were unauthorized or negligent. *Restatement, Second, Agency*, § 440.

2. Whatever the legal relationship of the parties, the express provisions of the contract preclude recovery by petitioner for its own negligence.[3]

---

[2] The *Yearsley* case did not involve any issue of a contractor's right to indemnity from the government for his losses resulting from the negligent performance of his contract. In that case the question was whether riparian owners had any claim against a government contractor for damages due to erosion resulting from his performance of a dredging contract. It was conceded that all of the contractor's acts were authorized and directed by the government. This Court affirmed a judgment in favor of the contractor, on the ground that the landowners' remedy was a suit for just compensation in the Court of Claims.

[3] Sections 438 and 439 of the *Restatement, Second, Agency*, cited by petitioner (Pet. 3, fn. 5), are inapposite. The rules of indemnity there stated are expressly inapplicable in the case of unauthorized acts by the agent, or where there exists an agreement, such as in the present contract, making the agent liable for his own negligence.

Article 11 of the contract (*supra*, p. 3) made petitioner "responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work" (Pet. 18). Since the damages assessed against petitioner, for which it sought indemnity, resulted from its negligence in permitting spoil and salt water to enter the fresh water canal (see *infra*, pp. 9-10), this provision barred petitioner's recovery.

Petitioner argues that the provision should not be applied because its negligence occurred "while performing dredging work in accordance with Government plans and specifications" (Pet. 14). But petitioner did not follow the specifications. The drawings which were a part of the specifications showed the fresh water canal, and specifically directed petitioner to prevent the entry of any material into it.[4] Plainly, the contract provision was correctly applied by the court below to make petitioner bear the responsibility for its own negligent acts.

3. Contrary to petitioner's contention (Pet. 2, 10), there was no material factual issue that precluded granting the government's motion for summary judgment. The critical question, as the Court of Claims

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[4] The direction on Sheet 5 of the specifications that petitioner was to keep material out of the canal was clear and specific. Petitioner does not claim either that it complied with this specification or that it was unable to do so. Indeed, petitioner alleged in the present action that, in accordance with the provisions of the contract (Par. GC-2.), it "made a careful inspection of the dredging site prior to submitting its bid" (Pet. 35). There is nothing to indicate that petitioner ever advised the government, or even considered, that it could not comply with the prohibition against contaminating the canal.

properly ruled, was whether petitioner had been negligent in permitting spoil and salt water to get into the fresh water canal. The State court, in imposing liability upon petitioner for its actions, found that petitioner had been negligent. Since petitioner's suit against the United States for indemnity was predicated upon the state court judgment, the Court of Claims necessarily looked to the findings of the State court to determine the basis upon which it had held petitioner liable.

The Court of Claims properly treated the State court's findings of negligence as final for purposes of determining the government's liability in this action. Petitioner's suit, by its own statement, is one for indemnity (Pet. 8). Under the general rule in such cases, petitioner, in relying upon the earlier judgment, is bound by the findings respecting his own negligent acts upon which that judgment rested; and since these facts were, under the express provisions of his contract with the government, fatal to recovery against the United States, he could not successfully maintain the present action. *Restatement of Judgments*, § 107, comment h, p. 517; 30A Am. Jur., *Judgments*, § 424, p. 477; 42 C.J.S., *Indemnity*, § 32(2)b, p. 619.

There is no merit to petitioner's contention (Pet. 11) that the contracting officer, by accepting the work and certifying that it had been performed in accordance with the contract, thereby found that petitioner had not been negligent in permitting the spoil and salt water to get into the canal. The contracting officer merely determined that, as far as the government's requirements were concerned, the work met the con-

tractual specifications. In view of the specific provision in Article 11 that petitioner would be liable for its own negligence, the contracting officer obviously did not relieve petitioner of that responsibility by accepting the work as performed.

Petitioner contends (Pet. 11) that the decision below conflicts with principles enunciated in *United States* v. *Moorman*, 338 U.S. 457, and *Plumley* v. *United States*, 226 U.S. 545, governing the finality of determinations made by contracting officers under contract "disputes" clauses. But those principles are inapplicable to the instant case, where the contracting officer did not determine whether petitioner had been negligent toward third persons when he accepted the work for the government.

4. Contrary to petitioner's assertion (Pet. 14-15), the decision below poses no serious problem in the government's business relationships with its contractors. There is nothing novel in the holding that, on the facts, petitioner was an independent contractor; in any event, the decision is not contrary to any legal principles of indemnity cited by petitioner. The standard contract clause (41 U.S.C. App. 54.13) which precluded petitioner's recovery for its own negligence is unambiguous, and there is no need for its interpretation by this Court. A contractor who signs such a contract cannot be under any misapprehension that, if he performs the work negligently, he, and not the government, is responsible for such negligence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

JOHN G. LAUGHLIN, JR.,
KATHRYN H. BALDWIN,
Attorneys.

JUNE, 1961.

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JAMES R BROWNING Clerk

IN THE

Supreme Court of the United States

October Term, [redacted] 1961

NO. [redacted] 121

BAUER-SMITH DREDGING CO., INC., *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY BRIEF TO THE BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. G. SCHIRMEYER
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1960

NO. 1007

BAUER-SMITH DREDGING CO., INC., *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY BRIEF TO THE BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This reply brief is submitted because the opposition brief obliquely turns the questions presented in the petition in such a manner as to place the issues discussed in the petition in a false light. The opposition attempts to divert attention away from the inconsistent position taken by the Government in regard to the administration of Federal contracts. The Government, in its opposition brief, concedes that the Contracting Officer designated by the Secretary of Army certified and declared that the petitioner performed the dredging contract in question in

accordance with the plans and specifications of the Federal dredging contract and properly deposited dredged material in areas designated by the United States. The Government then takes the inconsistent position that the Federal dredging contract was not properly performed and on that basis alone charges the petitioner with negligence. This inconsistency is subtly presented by referring to a third party State Court decision, where a jury found that petitioner did not perform the Federal dredging contract in question according to Federal plans and specifications. On this ground alone the State Court held petitioner to be negligent. After knowingly and deliberately refusing to be a party to third party litigation, the Government now disavows its Contracting Officer's prior contrary findings and in lieu thereof accepts a third party jury finding. To date, the issue of whether the Government or its contractor was negligent has not been litigated because the United States has elected to use sovereign immunity as a legal shield.

THE GOVERNMENT'S QUESTION REVISED

With the above explanation, one can appreciate the incompleteness and the inaccuracy of the question as presented in the opposition brief (pp. 1 and 2). It should have read as follows:

> "Whether petitioner is entitled to indemnity from the United States for amounts paid by it to third parties in a case where petitioner performs its contractual obligations to the United States to the complete satisfaction of a Federal Contracting Officer and in strict accordance with the plans and specifications of the dredging contract in question."

The opposition brief does not touch on such vital questions as (1) Can the Justice Department disregard the certification of an agency of the Executive Department to the effect that a Federal contract was properly performed and in lieu thereof accept the fact findings of a State Court in a third party lawsuit, in which the United States refused to be a party? (2) Can the Justice Department defend a contractor's claim in the Court of Claims on the grounds that a State Court judgment overrules the fact findings of a Federal Contracting Officer relating to the performance of a Federal contract in a case where the breach of contract and negligence of the United States was not and could not be litigated by reason of sovereign immunity? (3) Can the Federal Government avoid its contractual obligations in a case where one branch of the Government certifies that a contractor's contractual obligations have been completely satisfied and where, at a later date, another branch of the Government disavows the satisfactory performance of a dredging contract on the grounds that subsequently a State Court held a Federal contractor negligent because its Federal contract was not performed in accordance with Federal plans and specifications? These and many other questions of far reaching public interest remain unanswered in the opposition brief.

ARGUMENT

1. If the principles of law established in *United States v. Moorman*, 338 U.S. 457, still govern, then the United States is estopped from arguing, either directly or indirectly, that the Federal contract was improperly performed or that dredged material or salt water was placed in an area or canal not designated by the United States. The opposition apparently appreciates the impact of the

Moorman decision but attempts to obliquely circumvent the Supreme Court ruling by arguing that petitioner was negligent. This argument is fallacious because it fails to advise the Court that the negligence relied upon is based solely upon a State Court fact finding that dredged material was deposited in places not designated by United States. The truth of the matter is, that the Federal Contracting Officer had previously declared and found as a fact, with full knowledge of the third party claim, that the dredged material was properly deposited in places designated by the United States. (Pet. 25, 26, 44-51). Since the Contracting Officer's ruling is conclusive by the terms of the contract, any argument or presentation of evidence by the Government to the contrary is irrelevant and immaterial and of no moment, in the absence of pleading and proof that the Contracting Officer acted in bad faith. To date, nobody has questioned the integrity, honesty and efficiency of the Federal Contracting Officer.

2. On a Motion for Summary Judgment, the Court of Claims, without any fact evidence before it, save an involved and technical dredging contract, concluded that petitioner was an independent contractor and not an agent. In rebuttal to the opposition brief, petitioner urges that the issue of agency was determined in Star Chamber fashion, without giving the contractor an opportunity to prove facts that the Government had sufficient control of the dredging project to place petitioner in the capacity of an agent of the Corps of Engineers, U. S. Army.

3. Contrary to the statement in the Government's brief, (p. 9) petitioner did not predicate its claim for reimbursement, indemnity or restitution upon a State judgment but predicates a recovery upon the dredging contract under consideration, as well as established principles of contract

law. It is the Government, not petitioner, who is relying on the State Court judgment. The Government seeks to erase the effect of its Contracting Officer's fact findings by relying on a State Court jury decision in a third party lawsuit in which the United States deliberately refrained from being a party after timely notice of the third party claim and litigation.

4. The Government relies upon Clause 11 of the dredging contract, relating to the negligence of the contractor, to defeat petitioner's contract action. In so doing, the Government seeks to insulate its own breach of contract and negligence. To date, the issue of the Government's negligence or breach of contract has not been litigated. By summary judgment procedure, petitioner has been denied the right to prove that the Government's inaccurate and improper dredging plans resulted in third party damage claims. Clause 11 was not intended to excuse a breach of contract on the part of the United States or its failure to furnish proper plans and specifications to its contractor or to penalize a Government contractor who is forced to defend a third party lawsuit alone while the United States sits on the side lines. The Government now disavows the findings of its own Contracting Officer and in its opposition brief stresses the third party negligence finding without admittng that the Unted States had already declared that the dredged material was deposited in accordance with the Government's plans and specifications.

5. The opposition brief states on page 10, that *United States v. Moorman*, 338 U.S. 457, is not applicable because the Contracting Officer made no decision concerning petitioner's negligence. This is begging the question. The Contracting Officer ruled upon facts which are binding upon the United States and are final and conclusive as far as

this contract action is concerned. On these facts, it is legally impossible for petitioner to be negligent on the grounds that dredged material was deposited in areas not designated by the United States.

6. It is argued in the opposition brief that the decision below poses no serious problem in the Government's business relationship with its contractors and does not affect the public interest. The truth is that every Government contractor must know, and has a right to know, the scope of the risk he assumes when he enters into a Government contract. Upon the calculation of the risk, the contract price is computed. A Government contractor must know whether he is required to serve only one or two masters, to-wit: the Contracting Officer of the United States and/or State Court juries. It must be admitted that a novel situation exists when the Federal Government concedes that State Courts may determine whether a Federal contractor exceeds the authority granted to him by the United States authorities. To argue that a State Court judgment in a third party damage suit can be substituted for a contrary finding made by a Federal Contracting Officer, is to argue against the position taken by the Justice Department in the *Moorman* case and related cases and the decision of this Court. The public interest in these cases was conceded by the Justice Department.

CONCLUSION

As heretofore mentioned, the case at bar presents a Federal and State conflict issue regarding the manner in which Federal construction contracts shall be performed and administered and construed. This case also presents a question of the encroachment of State authority upon Federal authority in reference to the performance of Federal

contracts. As between the Corps of Engineers, U. S. Army, and the Department of Justice, there is a conflict as to the method of determining whether a Federal contract is properly performed according to Federal plans and specifications. It is in the public interest that these conflicts be resolved so that Government contractors are not left in the position of paying third parties for the Government's mistakes. The decision below places upon qualified and bonded Government contractors, responsibilities not compatible to sound business practices and fair dealing.

Respectfully submitted,

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